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No.: ICC-01/04-02/06
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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Public redacted version of “Response on behalf of Mr Ntaganda to ‘Prosecution’s request for public redacted versions of filings and decisions on allegations of witness interference’”, ICC-01/04-02/06-770-Conf-Exp, 6 August 2015

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to the submission of the *“Prosecution’s request for public redacted versions of filings and decisions on allegations of witness interference”* by the Office of the Prosecutor (“Prosecution”) on 15 July 2015 (“Prosecution Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s request for public redacted versions of filings and decisions on allegations of witness interference”

“Defence Response”

OVERVIEW

1. The Defence hereby responds to the Prosecution Request, in which the Prosecution moves Trial Chamber VI (“Chamber”) to: (i) issue public redacted versions of six decisions² dealing with allegations of witness interference and related matters (“Six Decisions”); and (ii) order the “Parties” to file public redacted versions of the filings “underlying” these decisions, without redaction to the allegations of witness interference or the measures in place to address these allegations (“Underlying Filings”). Further, in the event the Prosecution Request is granted, the Prosecution asks that “[a]ny information which could identify victims and witnesses” be redacted.³
2. The Defence firmly believes in the importance for criminal proceedings to be held publicly as well as in the correlative importance for the record of these proceedings to be accessible to the public to the greatest extent possible. This can only but reinforce the trust of the public towards the judicial work of the International Criminal Court (“Court”), while at the same time ensuring that the parties and participants are fully apprised not only of the position of adopted by the parties on all matters raised before the Court, but also of the adjudicating body’s rationale underlying the decisions rendered on these matters.

¹ ICC-01/04-02/06-725-Conf-Exp.

² Namely: [REDACTED].

³ Prosecution Request, para.2.

3. In the instant case – leaving aside for the moment the Prosecution’s continuous practice of over redactions, thereby depriving the Defence of crucial information necessary to address the Prosecution’s allegations – the current *ex parte* and confidential classification of all filings and decisions related to the Prosecution’s allegations of disclosure of confidential case-related material and interference with witnesses, has caused great prejudice to the Defence in the performance of its work. Nonetheless, while placing on the case record public redacted versions of the Six Decisions and their Underlying Filings cannot redress the prejudice caused, it might assist the Defence in alleviating these difficulties.
4. Accordingly, the Defence does not oppose the Prosecution Request, subject, however, to the caveats outlined below.
5. That being said, the Defence takes serious issue with some of the reasons put forward by the Prosecution in support of its request, which either misrepresent the reality or are simply unfounded. In particular, the Defence notes that the Prosecution Request provides no compelling reasons demonstrating the appropriateness of the relief sought *at this point in time* more than before.
6. Should the Chamber be inclined to grant the Prosecution Request, the Defence respectfully submits that the filing of public redacted versions of the Underlying Filings should be subject to the following procedure.
7. First, along with the issuance of the public redacted version of the Six Decisions, the Chamber should make clear which specific submissions are included in the category of ‘underlying’ filings. This first step is required given the lack of specificity of the Prosecution Request in this regard; the expression ‘underlying’ being impermissibly vague.

8. Second, the Chamber should clearly identify which information must be redacted in each of the underlying filings. In this respect, the Defence notes that the Prosecution has failed to establish how information related to the identity of the alleged intimidators is likely to reveal the identity of the alleged victims of witness interference, and, for this reason, that such information must be redacted.
9. Third, considering the upcoming start of the trial and the heavy workload placed on the parties at this time, the Chamber should allow sufficient time to the parties to apply the necessary redactions and file public redacted versions of their submissions.⁴
10. Finally, considering that the Defence has expressed on various occasions the importance it attaches to the principle of the publicity of proceedings,⁵ and that the Prosecution appears to agree on the same,⁶ it would have been in the interest of judicial efficiency for both parties to consult with a view to agreeing on a procedure for jointly requesting the reclassification of the relevant decisions and submissions related to allegations of witness interference. Regrettably, the Prosecution opted not to approach the Defence on this important issue prior to the submission of its Request.

⁴ ICC-01/04-02/06-722-Conf ("Decision on LRVs' Access to Certain Filings"), para.12.

⁵ See e.g. ICC-01/04-02/06-709-Red ("Public redacted version of the Defence's application for leave to appeal"), paras.8-10.

⁶ Prosecution Request, paras.33-38.

SUBMISSIONS

I. The Prosecution Request fails to establish the appropriateness of reclassifying the Six Decisions and their Underlying Filings at this time

11. Strikingly, the Prosecution Request does not specify which circumstances trigger *at this time* – more than before – the need to place on the case record public redacted versions of the Six Decisions and their Underlying Filings.
12. The Prosecution merely refers to the fact that information regarding allegations of witness interference would already be in the “public domain”,⁷ the more recent illustration of it being the submission on 10 July 2015 of the public redacted version of the Defence’s application seeking leave to appeal the Chamber’s oral decision of 3 July 2015 postponing the commencement of the trial.⁸
13. In its Decision on LRVs’ Access to Certain Filings – issued on 15 July 2015, the same day the Prosecution submitted its Request – the Chamber considered that the *ex parte* classification of all filings and decisions dealing with allegations of witness interference continues to be the “appropriate level of confidentiality”.⁹
14. The Prosecution Request fails to identify any new circumstances demonstrating that the basis for the *ex parte* and confidential classification of the Six Decisions and their Underlying Filings no longer exists, pursuant to Regulation 23bis(3) of the Regulations of the Court (“RoC”).
15. Firstly, the situation at hand must be distinguished from the circumstances which led Trial Chamber III in the *Bemba* case to order the reclassification of

⁷ Prosecution Request, paras.39-44.

⁸ ICC-01/04-02/06-T-22-CONF-ENG, pp.3(II.24-25)-5(II.1-20) (“Chamber’s Oral Decision of 3 July 2015”).

⁹ Decision on LRVs’ Access to Certain Filings, para.13. Although the Decision on LRVs’ Access to Certain Filings dealt with the classification of only two Prosecution filings, the phrase “*Ex parte* Litigation” employed by the Chamber throughout its decision covers all the interlocutory decisions and filings related to allegations of witness interference.

documents related to allegations of witness interference as public, together with the necessary redactions. The degree at which the allegations of witness interference were known to the “public” in the *Bemba* case was much greater than in the instant case. Indeed, while in the *Bemba* case the allegations made the object of articles in the media,¹⁰ in the instant case, public references to allegations of witness interference are, at most, incidental and limited in nature.

16. Secondly, neither the filings referred to by the Prosecution in its Request, nor the instance mentioned at paragraph 44 of the Prosecution Request, are clear evidence of the fact that information regarding allegations of witness interference is already in the ‘public domain’.
17. With respect to the public redacted version of the Defence’s application for leave to appeal,¹¹ the Defence recalls that it scrupulously abided by the classification of the filings referred to in its Application, and exercised utmost caution in applying redactions to the same.¹² The public redacted version of the Defence’s application thus contains no reference whatsoever to allegations of witness interference, let alone any suggestion that there are such allegations in the instant case.
18. As regards the public redacted version of the Prosecution’s request for delayed disclosure,¹³ the Prosecution can certainly not rely on its own imprudent public reference to allegations of witness interference, as a reason to justify that the basis for the *ex parte* and confidential classification of the Six Decisions and their Underlying Filings no longer exists. It is noteworthy, in this regard, that the inadvertent notification to the Legal Representatives of Victims (“LRVs”) of two Prosecution filings related to allegations of witness

¹⁰ ICC-01/05-01/08-3063-Red, para.24 and fn.54.

¹¹ Referred to at paragraph 42 of the Prosecution Request.

¹² Public redacted version of the Defence’s application for leave to appeal, paras.8-10.

¹³ ICC-01/04-02/06-461-Red2 (“Public redacted version of the Prosecution’s request for delayed disclosure”), referred to at paragraph 43 of the Prosecution Request.

- interference was not considered by the Chamber as a sufficient basis for maintaining LRVs' access to these filings in their entirety.¹⁴
19. In relation to the fact that [REDACTED],¹⁵ it must be underscored – without prejudice to Defence submissions in its [REDACTED]¹⁶ – that the [REDACTED]. On this sole basis, it can certainly not be argued that information regarding allegations of witness interference is now in the “public domain”.¹⁷
 20. Furthermore, the Chamber's reference to Victims and Witnesses Unit (“VWU”) report entitled *“Victims and Witnesses Unit's report on potential interferences with some Prosecution witnesses and other individuals”*¹⁸ in a public redacted version of a decision¹⁹ – taken both in isolation and in light of paragraph 8 of the said decision – is not of such an extent that it would alert the public on the existence of allegations of witness interference in the instant case. Indeed, both paragraph 8 of the Decision on the Order of the First Witnesses and the title of VWU's report relied upon by the Chamber suggest, at most, the occurrence of witness interference in the instant case, but do not point out to the existence of a parallel litigation on allegations of witness interference involving Mr Ntaganda.
 21. It follows from the above that the Prosecution Request does not establish that allegations of witness interference are now in the ‘public domain’.

¹⁴ Decision on LRVs' Access to Certain Filings, paras.13-16.

¹⁵ Referred to at paragraph 44 of the Prosecution Request.

¹⁶ [REDACTED].

¹⁷ The Defence's observation herein must not be understood as minimizing in any way breaches of confidentiality. The Defence takes confidentiality very seriously and does not, and will not, tolerate disclosure of confidential information: [REDACTED].

¹⁸ ICC-01/04-02/06-634-Conf-Exp.

¹⁹ ICC-01/04-02/06-661-Red2 (“Decision on the Order of the First Witnesses”), referred to at paragraph 41 of the Prosecution Request.

II. Public redacted versions of the Six Decisions and their Underlying Filings should be subject to the following conditions

22. The Defence does not oppose the Prosecution Request. Nonetheless, the Defence respectfully requests that the reclassification of the Six Decisions and their Underlying Filings – which must include forthcoming decisions related to Prosecution’s allegations of witness interference and associated submissions by the parties – should be subject to the following procedure.
23. First, along with the issuance of a public redacted version of the Six Decisions, the Chamber should make clear which ‘underlying’ filings it considers to be related to each of these decisions.
24. Indeed, in its Request, the Prosecution fails to identify which filings it considers to be ‘underlying’ the Six Decisions. For example, it is not clear – in the absence of an exhaustive list of filings – whether the Defence’s request for leave to partially appeal the 8 December 2014 Decision²⁰ and the related response²¹ are filings “underlying” the 8 December 2014 Decision. In the submission of the Defence, all submissions allowing the public to understand the position taken by the parties and the Chamber’s rationale underlying its decisions, must be included in this category.
25. Second, the Defence respectfully requests the Chamber to clearly identify which information must be redacted in each of the underlying filings.
26. In this regard, while the Defence acknowledges that the identity of the alleged victims of witness interference should be redacted in the public versions of the Six Decisions and their Underlying Filings, the Defence opposes the Prosecution’s request that “any information tending to identify victims and witnesses in the decisions and related filings should be redacted”.²²

²⁰ ICC-01/04-02/06-413-Conf-Exp-Corr.

²¹ ICC-01/04-02/06-414-Conf-Exp.

²² Prosecution Request, para.35.

27. In particular, the Defence posits that the Prosecution's argument that information identifying those alleged to be interfering with witnesses may reveal the alleged victims' identities²³ is groundless and mere speculation. The Prosecution Request provides no compelling reasons showing that disclosing publicly the identity of the alleged intimidators may reveal the witnesses' identities. For instance, the Defence fails to understand how revealing to the public that [REDACTED] is alleged to have intimidated a Prosecution witness would lead the public to learn of Witness [REDACTED]'s identity. On the other hand, maintaining the names of the alleged intimidators will assist the Defence in investigating the Prosecution's allegations while at the same time deterring any witness interference.
28. Third, considering the upcoming start of the trial and the heavy workload placed on the parties at this time, the Defence respectfully requests the Chamber, when issuing a public redacted version of the Six Decisions, to allow sufficient time to the parties to apply the necessary redactions and file public redacted versions of their submissions.²⁴

CONFIDENTIALITY

29. Pursuant to Regulations 23bis (1) and (2) RoC, this Defence Response is submitted on a confidential *ex parte* basis – only available to the Chamber, Prosecution and Defence – as it responds to a filing bearing the same classification.

²³ Prosecution Request, para.35.

²⁴ ICC-01/04-02/06-722-Conf ("Decision on LRVs' Access to Certain Filings"), para.12.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

GRANT the Prosecution Request, subject to the conditions outlined above.

RESPECTFULLY SUBMITTED ON THIS 13TH DAY OF JANUARY 2016

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands